



SMALL BUSINESS ADMINISTRATION

13 CFR Part 125

RIN 3245-AH28

National Defense Authorization Act of 2020, Credit for Lower Tier Subcontracting and Other Amendments

AGENCY: U.S. Small Business Administration.

ACTION: Final rule.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its regulations to implement provisions of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020. The final rule will permit a prime contractor with an individual subcontracting plan to apply credit for subcontracts to small businesses at lower tiers toward its subcontracting goals. To do so, the prime contractor would incorporate the lower-tier subcontracting performance into its subcontracting-plan goals.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background Information

The SBA is revising its Small Business Subcontracting Plan regulations in 13 CFR 125.3 in response to changes made in section 870 of the National Defense Authorization Act (NDAA) of 2020, Public Law 116-92. Specifically, section 870 made changes to section 8(d) of the Small Business Act, 15 U.S.C. 637(d), regarding the requirements that apply to a Federal contractor seeking to obtain subcontracting credit on

certain types of Federal contracts. SBA published a proposed rule on December 19, 2022, 87 FR 77529, to implement section 870. After receiving comments from the public, SBA finalizes the rule with the changes described below.

Most Federal contracts require the awardee to enter into a subcontracting plan that includes percentage goals for using small businesses and subcategories of small businesses. Subcontracting plans apply to Federal contracts exceeding \$750,000 (\$1.5 million for construction), unless the awardee is a small business, the contract does not offer subcontracting opportunities, or the contract will be performed entirely outside the United States and its outlying areas. Prior to SBA's final rule published on December 23, 2016, 81 FR 94246, SBA's regulations permitted a prime contractor to count only its first-tier subcontracts toward the goals in its subcontracting plan. The December 2016 Final Rule, however, mandated that prime contractors receive credit for lower-tier subcontracts under certain criteria. Section 870 changed the criteria for receiving such credit, and this final rule implements those statutory changes.

Section 870 made three changes to subcontracting plan requirements. First, a prime contractor may elect, in some instances, to receive credit toward its subcontracting plan for lower-tier subcontracts to small businesses. Second, agencies are prohibited from setting tier-specific goals for prime contractors that use lower-tier credit. Third, subcontracting plans are required to recite the records that contractors will maintain to substantiate lower-tier credit.

These changes require SBA to change some of the provisions set forth in the December 2016 Final Rule. Most importantly, relying on prior statutory language, the December 2016 Final Rule made it mandatory for contractors with individual subcontracting plans to take credit for lower-tier subcontracts. Section 870, by contrast, removes the mandate and states that prime contractors "may elect to receive credit" either

for first-tier subcontracts on their own, or for subcontracts at any tier. Accordingly, SBA is changing the prior mandate to an election.

Additionally, the December 2016 Final Rule only allowed for contractors to receive lower-tier subcontracting credit if the contractor had two sets of subcontracting goals. A contractor would have a goal for small-business subcontracting at the first tier, and an additional goal for small business subcontracting at lower tiers. Section 870 prohibits agencies from setting tier-specific goals for prime contractors that use lower-tier credit. To address section 870, SBA is revising the regulations so that all prime contractors will have only one set of subcontracting goals. This rule also implements the requirement from section 870 that contractors include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit.

Section 870 further created a new subparagraph 8(d)(16)(B) in the Small Business Act, 15 U.S.C. 637(d)(16)(B), that requires agencies to collect, report, and review data on compliance with subcontracting plans. The new subparagraph duplicates existing statutory language in section 8(d)(7) of the Small Business Act, 15 U.S.C. 637(d)(7), and has already been implemented in SBA's regulations at 13 CFR 125.6(f)(8). Therefore, no regulatory changes are necessary to implement new subparagraph 8(d)(16)(B).

SBA received 10 comments in response to the proposed rule. The following section discusses and responds to the comments.

II. Summary of and Response to Comments

Support for the Rule

Comment: SBA received numerous comments expressing support for the proposed changes that are implemented by this final rule. One commenter specifically highlighted that this rule will increase small business utilization in Federal contracting.

Response: SBA acknowledges the commenters' support. SBA will implement the rule with the changes as noted below.

Outside the Scope of the Rule

Comments: SBA received four comments that were unrelated in any way to the proposed rule or the issue of credit for lower-tier subcontracting.

Response: As these comments do not relate to the rulemaking, SBA will not provide a response to these comments.

Comment: SBA received one comment regarding the applicability of lower-tier subcontracting credit for Small Business Participation Plans.

Response: Small Business Participation Plans are not within the purview of SBA regulations and thus are not impacted by this final rule.

Opposition to the Rule

Comments: SBA received two comments that opposed the proposed changes that are implemented by this final rule. One commenter opposed the rule on the basis that it grants credit to a prime contractor for the subcontracting work done by a first-tier or lower-tier subcontractor. This commenter emphasized that prime contractors would be able to get credit for something that they do not take full responsibility for. Another commenter opposed the rule on the basis that it would increase costs to the government.

Response: SBA is implementing these regulatory changes in line with the statutory mandate from section 870. In addition, SBA does not agree with the concerns of these commenters. Prime contractors will have to take some level of responsibility for lower-tier subcontracting in their subcontracting plan and compliance review. In addition, there is no basis for concluding that this rule will result in an increased cost to the government. Therefore, these comments do not justify SBA failing to implement the NDAA for FY 2020.

Concerns with Implementation in eSRS

Comments: Two commenters expressed concern with how the Electronic Subcontracting Reporting System (eSRS) would be able to handle the new reporting and

elections of lower-tier subcontracting under this rule. Specifically, they highlight issues with certifying subcontractor data entries and limitations in Individual Subcontractor Reports (ISRs) as points of concern.

Response: SBA does not believe that this final rule needs to determine exactly how the new lower-tier subcontracting election and reporting will work within eSRS. Prime contractors are not responsible for certifying the data entries input by subcontractors into eSRS. Any potential issues can be resolved by the technical teams that run eSRS.

Applicability of “Good Faith Effort” and Liquidated Damages to Lower-Tier Subcontracting

Comments: One commenter sought clarification on the applicability of “good faith effort” and liquidated damages to lower-tier subcontracting. Presumably, this commenter was referring to those terms as they are used in the context of subcontracting goals and performance under 13 CFR 125.3. This commenter also sought clarification on the standard of review that a prime contractor is subject to with respect to first-tier and lower-tier subcontractor performance. SBA also presumes this comment refers to Compliance Reviews which are described in 13 CFR 125.3(f).

Response: SBA is not altering any regulatory language other than what is noted below in this final rule. Thus, prime contractors are still subject to the requirement to make good faith efforts to meet subcontracting goals even when a prime contractor elects to receive credit for lower-tier subcontracting. In addition, an agency may impose liquidated damages if a contractor fails to demonstrate good faith effort or fails to provide a corrective action plan after receiving a marginal or unsatisfactory rating following a Compliance Review. 13 CFR 125.3(f)(5)(i). SBA is also declining to adopt a preferential or lenient review standard for Compliance Reviews as that process is described in 13 CFR 125.3(f).

Flow-Down of Federal Acquisition Regulation (FAR) Clauses to All Subcontracting Levels

Comment: One commenter requested that SBA provide regulatory language to direct flow-down of relevant FAR clauses (48 CFR Chapter 1) to all applicable subcontracts so that prime contractors can more easily rely on first-tier and lower-tier subcontractors to provide data necessary to comply with subcontracting requirements.

Response: Subcontracting flow-down clauses are already mandated under the CFR and FAR regulations. Therefore, including such language in this rule would be duplicative and unnecessary.

Ensuring Subcontractor Compliance

Comment: One commenter requested SBA assistance with holding other-than-small subcontractors accountable for their lower-tier subcontracting plans. This commenter specifically requested that SBA define its role in holding these subcontractors accountable when they fail to meet lower-tier subcontracting goals.

Response: SBA has an interest in seeing all subcontracting plans – at all levels of subcontracting – followed to ensure maximum small business utilization in Federal procurement. To that end, there should be consequences for subcontractors that fail to meet lower-tier subcontracting requirements. Prime contractors can accomplish this by not subcontracting to firms that continuously fail to meet subcontracting requirements. In some cases, it may be appropriate for the government to send a “show cause” letter that proposes debarment for subcontractors that repeatedly fail to meet their lower-tier subcontracting goals.

Applicability to Commercial Goods and Services

Comment: One commenter requested that commercial goods and services be omitted from the reporting requirements on prime contractors and subcontractors. This

commenter cited a FAR clause that exempts small business reporting requirements for commercial goods and services.

Response: This comment is not related to lower-tier subcontracting credit which is the focus of this rule. This rule does not change any of the reporting requirements for commercial goods and services, it merely allows a prime contractor to elect to receive credit for lower tier subcontracting. The exception to reporting for commercial goods and services found at FAR 52.219-9(j) remains in place. Commercial goods and services could be part of any subcontracting plan so changing the reporting requirements for them would require a much broader rulemaking than the instant one.

Timeline for Incorporating Lower-Tier Subcontracting Plan

Comment: One commenter requested a specific timeline for incorporating lower-tier subcontracting goals of within 90 days of contract award. The commenter noted the difficulty in gathering the required information from first-tier and lower-tier subcontractors in order to prepare a full subcontracting plan especially when relying on input from first-tier and lower-tier subcontractors.

Response: SBA is not adopting this timeline within 13 CFR 125.3(a)(1)(i)(C)(I). All prime contractors are required to have a subcontracting plan in place by the time of award in those cases where a subcontracting plan is mandated by 13 CFR 125.3(a).

Remove Restriction on Governmentwide and Multi-Agency Contracts

Comments: One commenter requested that SBA remove the language in the new regulations that would prohibit lower-tier subcontracting credit for governmentwide and multi-agency contracts. This commenter argued that SBA's proposed regulatory change enlarges the restrictions on lower-tier subcontracting as written in section 870. They requested that SBA strike the language referring to governmentwide and multi-agency contracts in proposed 13 CFR 125.3(a)(1)(i)(C)(5).

Response: The restriction on governmentwide and multi-agency contracts comes directly from the language of section 870. The categories listed in the second sentence of proposed regulation 13 CFR 125.3(a)(1)(i)(C)(5) are all synonymous with “more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency.” Thus, SBA is declining to adopt this comment as it is counter to the plain language of section 870.

Clarification on Definition of “Single Contract with One Federal Agency”

Comment: One commenter requested that SBA define what is meant by a single contract with one Federal agency. Specifically, this commenter wanted to know whether individual branches (Army, Navy, etc.) within the Department of Defense are treated as separate agencies.

Response: The term “Executive Agency” is defined in FAR 2.101. In this specific example, Army and Navy would be treated as separate agencies for Federal procurement.

Whether a Firm Can Opt-In to the Lower-Tier Subcontracting Credit During Contract Performance

Comments: One commenter asked whether it is possible to “opt-in” to receiving credit for lower-tier subcontracting during the performance of a contract. This commenter highlighted examples where the use of an other-than-small subcontractor may not be known until years into the performance of a contract. In such cases it may be appropriate for the prime contractor to elect to receive credit for lower-tier subcontracting well after contract award.

Response: SBA recognizes that there may be instances when a prime contractor is unaware of subcontracting opportunities for other-than-small firms until after contract award and during performance. However, prime contractors can always request a modification of their subcontracting plan from the contracting officer to account for

newly discovered other-than-small subcontractors or other changed circumstances.

Section-by-Section Analysis

Section 125.3(a)

SBA is changing the threshold for a required subcontracting plan to \$750,000.

This makes the threshold consistent with the FAR subpart 19.7 and with other references to the threshold in § 125.3.

Section 125.3(a)(1)(i)(C)

SBA is revising the language of 13 CFR 125.3(a)(1)(i)(C) to incorporate the two statutory changes from section 870 that differ from SBA's December 2016 rule: creating an election for using lower-tier subcontracting credit and prohibiting more than one set of goals.

First, the revised language makes lower-tier subcontracting credit discretionary in some circumstances. A prime contractor may elect to take credit for lower-tier subcontractors only when the subcontracting plan applies to a single contract with one Federal agency. In other situations—i.e., where the plan applies to more than one contract or to a single contract with more than one agency—section 870 prohibits the prime contractor from receiving credit for lower-tier subcontracting. Commercial plans and comprehensive subcontracting plans therefore are not eligible to use lower-tier subcontracting credit. They must instead rely solely on first-tier subcontracts. Additionally, governmentwide contracts and multi-agency contracts are not permitted to use lower-tier subcontracting credit.

Where a prime contractor elects to include lower-tier subcontracts towards its goal, the prime contractor will be credited with lower-tier subcontracts that are reported under lower-tier subcontracting plans. This rule does not require prime contractors to submit additional reports. Prime contractors will be required to report only their first-tier awards. Lower-tier subcontracting awards are required to be reported by the prime

contractor's lower-tier subcontractors in accordance with their subcontracting plans and SBA's regulations. SBA believes that only having each subcontract at any tier reported once will help prevent duplicative counting of the same awards.

Second, the rule eliminates the prior provision that a prime contractor would have two sets of subcontracting goals—one for the first tier and one for lower tiers. Instead, the prime contractor will incorporate the subcontracting-plan goals of its lower-tier subcontractors into its individual-subcontracting-plan goals.

Section 125.3(c)

SBA is creating a new requirement codified at 13 CFR 125.3(c)(1)(xii) to incorporate the new recordkeeping requirements on contractors with subcontracting plans. Specifically, prime contractors are required to maintain records of the procedures used to substantiate the credit they elect to receive for lower-tier subcontracting under 13 CFR 125.3(a)(1)(i)(C).

III. Compliance with Executive Orders 12866, 12988, 13132, 13175, and 13563, the Congressional Review Act (5 U.S.C. 801-808), the Paperwork Reduction Act (44 U.S.C., Ch. 35), and the Regulatory Flexibility Act (5 U.S.C. 601-612)

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this rule is not a significant regulatory action for the purposes of Executive Order 12866.

Executive Order 13563

SBA previously solicited comments from the public on a proposal to provide credit for lower-tier subcontracting. 80 FR 60300. Those comments were considered for this rulemaking. Additionally, as part of its ongoing efforts to engage stakeholders in the development of its regulations, SBA has solicited comments and suggestions from

procuring agencies on how to best implement section 870. SBA has incorporated those comments and suggestions to the extent feasible.

Executive Order 12988

For purposes of Executive Order 12988, SBA has drafted this rule, to the extent practicable, in accordance with the standards set forth in section 3(a) and 3(b)(2) of that Executive order, to minimize litigation, eliminate ambiguity, and reduce burden. This rule has no preemptive or retroactive effect.

Executive Order 13175

This rule does not have tribal implications under Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, because it does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

Executive Order 13132

For the purpose of Executive Order 13132, SBA has determined that this rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various layers of government. Therefore, SBA has determined that this rule has no federalism implications warranting preparation of a federalism assessment.

Paperwork Reduction Act, 44 U.S.C. Ch. 35

This rule updates the requirements for small business subcontracting plans to add a requirement for prime contractors to include in their subcontracting plans a statement of the types of records they will maintain to substantiate subcontracting credit. The FAR rule implementing this requirement will account for this information collection, and clearance for the information collection will be obtained by the FAR Council.

Regulatory Flexibility Act, 5 U.S.C. 601-612

According to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601, when an agency issues a rulemaking, it must prepare a regulatory flexibility analysis to address the impact of the rule on small entities. However, section 605 of the RFA allows an agency to certify a rule, in lieu of preparing an analysis, if the rulemaking is not expected to have a significant economic impact on a substantial number of small entities. The RFA defines "small entity" to include "small businesses," "small organizations," and "small governmental jurisdictions."

This rule concerns various aspects of SBA's contracting programs. As such, the rule relates to small business concerns, but would not affect "small organizations" or "small governmental jurisdictions" because those programs generally apply only to "business concerns" as defined by SBA regulations, in other words, to small businesses organized for profit. "Small organizations" or "small governmental jurisdictions" are non-profits or governmental entities and do not generally qualify as "business concerns" within the meaning of SBA's regulations.

There are approximately 350,000 concerns registered as small business concerns in the System for Award Management (SAM) that could potentially be impacted by the implementation of section 870. However, SBA cannot say with any certainty how many will be impacted because we do not know how many of these concerns participate in government contracting as subcontractors. A firm is required to register in SAM in order to participate in Federal contracting as a prime contractor, but not for purposes of subcontracting. Therefore, there are no known compliance or other costs imposed by this rule on small business concerns.

In sum, the regulatory amendments implemented by this rule will not have a disparate impact on small businesses and will increase their opportunities to participate in Federal Government contracting as subcontractors without imposing any additional costs.

For the reasons discussed, SBA certifies that this rule will not have a significant economic impact on a substantial number of small business concerns.

Congressional Review Act (5 U.S.C. 801–808)

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a “major rule” may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. SBA will submit a report containing this rulemaking and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. This rulemaking has been reviewed and determined by OMB not to be a “major rule” under 5 U.S.C. 804(2).

List of Subjects in 13 CFR Part 125

Government contracts, Government procurement, Reporting and recordkeeping requirements, Small businesses, Small business subcontracting.

For the reasons stated in the preamble, SBA amends 13 CFR part 125 as follows:

PART 125--GOVERNMENT CONTRACTING PROGRAMS

1. The authority citation for 13 CFR part 125 is revised to read as follows:

Authority: 15 U.S.C. 632(p), (q), 634(b)(6), 637, 644, 657f, 657q, 657r, and 657s; 38 U.S.C. 501 and 8127.

2. Amend § 125.3 by:

- a. Removing the number “\$650,000” in paragraph (a) introductory text and adding in its place the number “\$750,000”;

- b. Revising paragraph (a)(1)(i)(C);

- c. Removing the word “and” after the semicolon at the end of paragraph (c)(1)(xi);

- d. Redesignating paragraph (c)(1)(xii) as paragraph (c)(1)(xiii); and

e. Adding a new paragraph (c)(1)(xii).

The revision and addition read as follows:

§ 125.3 What types of subcontracting assistance are available to small businesses?

(a) * * *

(1) * * *

(i) * * *

(C) Where the subcontracting goals pertain only to a single contract with one Federal agency, the contractor may elect to receive credit for small business concerns performing as first-tier subcontractors or subcontractors at any tier pursuant to the subcontracting plans required under paragraph (c) of this section in an amount equal to the dollar value of work awarded to such small business concerns. The election must be recorded in the subcontracting plan. If the contractor elects to receive credit for subcontractors at any tier, the following requirements apply:

(1) The prime contractor must incorporate the subcontracting-plan goals of their lower-tier subcontractors in its individual-subcontracting-plan goals.

(2) To receive credit for their subcontracting, lower-tier subcontractors must have their own individual subcontracting plans.

(3) The prime contractor and any subcontractor with a subcontracting plan are responsible for reporting on subcontracting performance under their contracts or subcontracts at their first tier. This reporting method applies to both individual subcontracting reports and summary subcontracting reports.

(4) The prime contractor's performance under its individual subcontracting plan will be calculated by aggregating the prime contractor's first-tier subcontracting achievements with the achievements of the prime contractor's lower-tier subcontractors that have flow-down subcontracting plans.

(5) If the subcontracting goals pertain to more than one contract with one or more Federal agencies, or to one contract with more than one Federal agency, the prime contractor shall receive credit only for first-tier subcontractors that are small business concerns. This restriction applies to all commercial plans, all comprehensive subcontracting plans with the Department of Defense, governmentwide contracts, and multi-agency contracts.

* * * * *

(c) * * *

(1) * * *

(xii) The prime contractor must provide a written statement of the types of records it will maintain to demonstrate that procedures have been adopted to substantiate the subcontracting credit that the prime contractor elects under paragraph (a)(1)(i)(C) of this section; and

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Isabella Casillas Guzman,
Administrator.